STATE OF MICHIGAN

COURT OF APPEALS

BURDA BROTHERS, INC., ELISSA BURDA, and EFIM BURDA,

Plaintiffs-Appellants,

v

WAYNE COUNTY, RAYMOND WALSH, EDWARD CARRAVALLAH, ALI BERRY, and CANTON TOWNSHIP,

Defendants-Appellees.

UNPUBLISHED
August 19, 2003

No. 237604
Wayne Circuit Court
LC No. 97-720503-CZ

BURDA BROTHERS, INC., ELISSA BURDA, and EFIM BURDA,

Plaintiffs-Appellants,

and

JAMES BURDA,

Plaintiff,

v

RAYMOND WALSH, WAYNE COUNTY PROSECUTOR, TAMMY COLLING, ALEX WILSON, RENE LEBLANC, ART WINKLE, MICHAEL RORABACHER, RUSS HEATWOLE, MARK SCHULTZ, MICHIGAN STATE POLICE, GARY GRAY, DEBBY HOUSE, CHARLES R. SCHUMAKER, KARLA KEEFER, LANY BOHNSACK, CANTON TOWNSHIP, JOHN SANTOMAURO, and SCOTT HUGHSDON,

Defendants-Appellees,

No. 237605
Wayne Circuit Court
LC No. 98-819654-CZ

and

ROBERT SMEDLEY,

Defendant.

BURDA BROTHERS, INC.,

Plaintiff-Appellant,

and

AMERICAN FIREWORKS USERS ASSOCIATION,

Plaintiff,

v

CANTON TOWNSHIP,

Defendant-Appellee.

No. 237606
Wayne Circuit Court
LC No. 94-420168-CZ

Before: Donofrio, P.J., and Bandstra and O'Connell, JJ.

PER CURIAM.

Plaintiffs-appellants (hereafter "plaintiffs") appeal as of right, challenging the trial court's orders granting defendants' motions for summary disposition and denying plaintiffs' motion to amend their complaint. We affirm.

These consolidated appeals involves three separate cases filed by plaintiffs in Wayne Circuit Court in 1994, 1997, and 1998, against various governmental agencies and their agents.[1] The cases were consolidated in the trial court as part of its final order. Plaintiff Burda Brothers, Inc. ("Burda Inc.") sought declaratory and injunctive relief against defendant Canton Township in the 1994 case, which arose from efforts to enforce state fireworks laws against Burda Inc.'s seasonal fireworks business in Canton Township. In a previous appeal brought by the Wayne

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[1] In this opinion, we refer to defendants in accordance with their governmental unit, as appropriate. Wayne County and its agents are referred to as the "County defendants." The Michigan State Police and its agents are referred to as the "State Defendants." Canton Township and its agents are referred to as the "Canton defendants."

County Prosecutor as an intervening appellant in the 1994 case, this Court reversed the trial court's ruling that federal law preempted Michigan's fireworks statutes, MCL 750.243a through MCL 750.243d. *Burda Bros, Inc v Canton Twp*, unpublished opinion per curiam, issued July 1, 1997 (Docket No. 195051). Plaintiffs thereafter filed separate actions in 1997 and 1998, whereby they pursued additional claims for monetary damages stemming from law enforcement activities involving the execution of search warrants in 1995 and 1997, and the arrest and prosecution of plaintiffs for violating Michigan's fireworks statutes.

Defendants removed plaintiffs' federal claims under 42 USC 1983 to the federal district court, which dismissed the federal claims with prejudice. The federal court declined to exercise jurisdiction over plaintiffs' state law claims, and the matter was remanded to state court with regard to those claims. On remand, the Wayne Circuit Court granted defendants summary disposition of plaintiffs' state claims. The trial court subsequently denied plaintiffs' motion for reconsideration, as well as their motion to file an amended complaint.

I

On appeal, plaintiffs first argue that they were entitled to "claim preclusion" as a result of previous rulings in their favor that were never appealed or reversed. Plaintiffs have failed to properly present this issue for our review because they give only cursory treatment to each of the judicial rulings underlying their claim, and also fail to provide record citations establishing the factual support for their arguments on appeal. See *Eldred v Ziny*, 246 Mich App 142, 150; 631 NW2d 748 (2001); *People v Norman*, 184 Mich App 255, 260; 457 NW2d 136 (1990).

We note, however, that the doctrine of collateral estoppel, on which plaintiffs rely, relates to issue preclusion, rather than claim preclusion, and that an essential element of collateral estoppel is that a previous proceeding culminated in a valid, final judgment. *Nummer v Dep't of Treasury*, 448 Mich 534, 542; 533 NW2d 250 (1995), *Ditmore v Michalik*, 244 Mich App 569, 577; 625 NW2d 462 (2001). To the extent that plaintiffs rely on court orders entered in the 1994 and 1997 cases as the basis for a collateral estoppel argument, their arguments have no merit. The June 9, 1995, supplemental preliminary injunction in the 1994 case did not resolve any issue with finality. A preliminary injunction is granted before a decision on the merits. *Michigan Coalition of State Employee Unions v Civil Service Comm*, 465 Mich 212, 219; 634 NW2d 692 (2001). Indeed, before entry of a final judgment regarding the state claims in plaintiffs' three cases, the trial court was free to modify any earlier orders in the cases to reflect a correct adjudication of the parties' rights and liabilities. MCR 2.604(A); *Meagher v Wayne State Univ*, 222 Mich App 700, 718; 565 NW2d 401 (1997). The only limitation was that the trial court could not act inconsistent with this Court's July 1, 1997, decision in Docket No. 195051, which reversed the trial court's earlier declaratory ruling based on an error of law concerning preemption. See *Grievance Administrator v Lopatin*, 462 Mich 235, 260; 612 NW2d 120 (2000) (a lower court may not take action on remand that is inconsistent with an appellate court's judgment).[2] Further, while the 35th District Court's May 31, 1996, order dismissing the 1995

[2] Contrary to what plaintiffs assert on appeal, this Court did not affirm an order for the return of property in the 1994 case. Although this Court ordered a stay to allow for an evidentiary (continued…)

criminal charges against plaintiffs Elissa Burda and Efim Burda was entered as part of a different proceeding, the order reflects that it was based on the same error of law concerning federal preemption that the trial court in this case made. Thus, even assuming that the "same parties" and "full opportunity to litigate" elements for collateral estoppel could be satisfied with respect to one or more of the defendants here, the doctrine of collateral estoppel did not preclude the trial court from taking account of this error of law. 1 Restatement Judgments, 2d, § 28(2), p 273; *Nummer*, *supra* at 542.

Because plaintiffs have not shown that they were entitled to use collateral estoppel affirmatively with regard to any issue or defendant, we find it unnecessary to address defendants' alternative arguments concerning the conclusive effect of the federal court's resolution of collateral estoppel issues.

II

Plaintiffs next argue that the trial court failed to apply the appropriate standards for reviewing a motion for summary disposition because it did not view the facts most favorably to them, made findings of fact contrary to the record, and disregarded the rules of evidence concerning the effect of a no contest plea. In considering this issue, we reject the Canton defendants' claim that this Court is limited to reviewing the trial court's denial of plaintiffs' motion for reconsideration. Our review of the trial court's original order granting summary disposition is appropriate in this appeal by right. *Gavulic v Boyer*, 195 Mich App 20, 23-24; 489 NW2d 124 (1992), overruled on other grounds in *Allied Electric Supply Co, Inc v Tenaglia*, 461 Mich 285, 288-289; 602 NW2d 572 (1999); *Dean v Tucker*, 182 Mich App 27, 30-31; 451 NW2d 571 (1990). We note, however, that plaintiffs' argument on appeal consists largely of the same arguments made in their motion for reconsideration. We shall examine the trial court's decisions on the basis of the record developed at the time each particular motion was decided.

We review a decision on a motion for summary disposition under MCR 2.116(C)(10) de novo to determine if the moving party was entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). The affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties must be considered in a light most favorable to the nonmoving party to determine if a genuine issue of material fact exists for trial. *Ritchie-Gamester v Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). If the proffered, admissible evidence does not establish a genuine issue on any material fact, the moving party is entitled to judgment as a matter of law. *Maiden*, *supra* at 120-121. A trial court's decision on a motion for reconsideration is reviewed for an abuse of discretion. *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000).

(…continued)

hearing, the prosecutor's application for leave to appeal in Docket No. 186765 was ultimately denied on August 25, 1995, "for failure to persuade the Court of the need for immediate review." That denial was not the equivalent of an affirmance. *Great Lakes Realty Corp v Peters*, 336 Mich 325, 328-329; 57 NW2d 901 (1953). Indeed, the language used in this Court's order ("failure to persuade the Court of the need for immediate review") suggests the possibility that the issue could be reviewed later. See *People v Torres*, 452 Mich 43, 59; 549 NW2d 540 (1996).

We conclude that plaintiffs' assertions regarding alleged outcome-determinative mistakes by the trial court are inadequate to show on de novo review that summary disposition was improperly granted in favor of defendants with regard to any state claims underlying their complaints in the 1994, 1997, and 1998 cases. Plaintiffs' cursory treatment of the factual and legal bases of their state claims precludes appellate review. *Eldred*, *supra* at 150.

We note, however, that, with regard to plaintiffs' specific claim concerning the February 1999, no contest pleas, the record does not show that the trial court treated the pleas as evidence of guilt arising out of the 1996 arrests. Rather, the record reflects, particularly as indicated by the trial court's ruling concerning plaintiffs' motion for reconsideration, that the court was attempting to ascertain whether the disposition of those criminal charges could support a claim for malicious prosecution.

To establish malicious prosecution, a plaintiff must show that the earlier criminal proceeding was terminated in the plaintiff's favor. *Matthews v Blue Cross & Blue Shield of Michigan*, 456 Mich 365, 379; 572 NW2d 603 (1998). Courts have generally held that a proceeding is terminated in favor of an accused when its final disposition suggests that the accused is innocent. *Cox v Williams*, 233 Mich App 388, 392; 593 NW2d 173 (1999). Although a no contest plea is not treated as an admission of guilt in Michigan, *Lichon v American Universal Ins Co*, 435 Mich 408, 428; 459 NW2d 288 (1990), it does not suggest innocence.

Indeed, we note that plaintiffs' own motion for summary disposition or declaratory relief sought only a declaration that they were maliciously prosecuted relative to the 1995 charges that were dismissed pursuant to the 35th District Court's May 31, 1996, order. Given the evidence that the May 31, 1996, order was based on an error of law concerning federal preemption, we reject plaintiffs' claim on appeal that the May 31, 1996, order establishes a termination of the criminal proceeding in their favor with respect to state law charges.

In sum, examining the disposition of the criminal charges in the context of the malicious prosecution claim, we find no basis for disturbing the trial court's decision regarding the termination-in-favor-of-the-accused element. It was incumbent upon plaintiffs, as the parties with the burden of proof, to set forth specific facts showing a genuine issue for trial. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). In light of our disposition of plaintiffs' claim, we need not consider the alternative grounds for affirmance argued by defendants. Plaintiffs' second issue affords no basis for relief relative to their claim for malicious prosecution or other causes of action.

III

For their third issue, plaintiffs argue that the trial court, in granting summary disposition, effectively reversed this Court's earlier decision, and other previous rulings by the courts quashing search warrants and dismissing criminal charges in 1995 and 1997. Again, plaintiffs have failed to adequately brief this issue and, therefore, it is not properly presented for our review. *Eldred*, *supra.* In any event, to the extent that plaintiffs' claim is based on principles of collateral estoppel or the law of the case, our resolution of plaintiffs' first issue controls this issue as well. Plaintiffs' other claims regarding whether fact questions existed for a jury relative to search and seizures issues, see *Hill v McIntyre*, 884 F2d 271 (CA 6, 1989), are not properly before this Court because they are not set forth in plaintiffs' statement of the issue. MCR

7.212(C)(5); *Busch v Holmes*, 256 Mich App 4, 12; 662 NW2d 64 (2003); *Lansing v Hartsuff*, 213 Mich App 338, 351; 539 NW2d 781 (1995).

However, we note that, while the trial court referred to plaintiffs' constitutional claims as "Fourth Amendment" and "First Amendment" claims for ease of exposition in its opinion, only state constitutional claims were before the court. Once again, plaintiffs have insufficiently briefed their state constitutional claims to invoke appellate review. *Eldred*, *supra*. Further, to the extent plaintiffs' arguments on appeal are directed at their state constitutional claims against the Canton defendants and the County defendants, plaintiffs' failure to brief a necessary issue precludes appellate relief. *Roberts & Son Contracting, Inc v North Oakland Dev Crop*, 163 Mich App 109, 113; 413 NW2d 744 (1987). The trial court dismissed the state constitutional claims against these defendants pursuant to *Jones v Powell*, 462 Mich 329, 335; 612 NW2d 423 (2000), because other remedies were available. Hence, it was not necessary for the court to determine if a genuine issue of material fact existed with regard to the state constitutional claims against these defendants.

Although the trial court addressed whether a genuine issue of material fact was shown pursuant to MCR 2.116(C)(10) with regard to plaintiffs' state constitutional claims against the State defendants, we agree with the State defendants that the court erred in not applying *Jones*, *supra*, to the individual State defendants (Gary Gray, Debby House, Charles Schumacher, Lany Bohnsack, and Karla Keefer). Although neither states nor state officials acting in an official capacity may be sued under 42 USC 1983, lawsuits for money damages against public officials in their individual capacities are not precluded. *Goodmon v Rockefeller*, 947 F2d 1186 (CA 4, 1991); *Thomas v McGinnis*, 239 Mich App 636, 643 n 6; 609 NW2d 222 (2000). In fact, the federal district court treated the individual State defendants as coming within the scope of plaintiffs' federal claims when granting the individual State defendants summary disposition on August 16, 1999.

The individual State defendants were not required to file a cross-appeal to urge alternative grounds for affirmance. *Middlebrooks v Wayne Co*, 446 Mich 151, 166 n 41; 521 NW2d 774 (1994). Hence, even if the trial court erred in resolving plaintiffs' state constitutional claims against the individual State defendants under MCR 2.116(C)(10), we would not reverse because the right result was reached. See *Hall v McRea Corp*, 238 Mich App 361, 369; 605 NW2d 354 (1999).

We also agree with the State defendants' argument that the Wayne Circuit Court lacked subject matter jurisdiction over plaintiffs' claim for money damages against the Michigan State Police. The Court of Claims had exclusive jurisdiction over the claim for money damages. See MCL 600.6419(a). "A claim of lack of subject-matter jurisdiction may be raised at any time, even if for the first time on appeal." *Davis v Dep't of Corrections*, 251 Mich App 372, 374; 651 NW2d 486 (2002). Accordingly, we find it unnecessary to address plaintiffs' arguments on appeal with regard to their state constitutional claims against the Michigan State Police. The arguments are moot in light of the trial court's lack of subject-matter jurisdiction.

IV

For their fourth issue, plaintiffs argue that the trial court improperly decided the issue of probable cause for the quashed warrants rather than submitting that question for resolution by a

jury, as a question of fact. Substantively, however, plaintiffs present a cursory argument concerning whether the trial court improperly dismissed their due process claims. The foregoing resolution of plaintiffs' state constitutional claims pursuant to *Jones*, *supra*, and the trial court's lack of subject matter jurisdiction with regard to the Michigan State Police, are dispositive of this issue.

V

Plaintiffs next argue that they stated a valid free-speech retaliation claim. Again, because this issue involves plaintiffs' state constitutional claims, our resolution of plaintiffs' state constitutional claims pursuant to *Jones*, *supra*, and the trial court's lack of subject matter jurisdiction with regard to the Michigan State Police, are likewise dispositive.

VI

Finally, plaintiffs argue that the trial court abused its discretion by denying their motion to amend their complaint. The trial court's opinion denying plaintiffs' motion reflects that it found the claims arising from law enforcement activities within the scope of plaintiffs' previously filed complaints to be futile based on the evidence before it. With regard to common-law claims, the trial court noted that plaintiffs' "other claims in the common law are no more than an attempt to dress up their malicious-prosecution/false arrest claims in new clothing." The court also considered the untimeliness of plaintiffs' motion to amend in denying their request to add new plaintiffs and new acts. The court stated that "[i]t makes no sense to add new claims to those that have already been dismissed." Further, contrary to what plaintiffs argue on appeal, the record reflects that the County defendants filed a response to plaintiffs' motion in which both delay and prejudice were advanced as reasons for denying the motion. Given plaintiffs' failure to show any basis for vacating the trial court's grant of summary disposition in favor of defendants, we are not persuaded that the court abused its discretion by denying their motion to amend. MCR 2.116(I)(5); *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997); *Lane v KinderCare Learning Ctrs, Inc*, 231 Mich App 689, 697; 588 NW2d 715 (1998); see also *Gardner v Stodgel*, 175 Mich App 241; 437 NW2d 276 (1989).

Affirmed. Defendants, being the prevailing parties, may tax costs under MCR 7.219(A).

/s/ Pat M. Donofrio
/s/ Richard A. Bandstra
/s/ Peter D. O'Connell